

JOSEPH P. RUSSONIELLO (CSBN 44332)
 United States Attorney
 JOANN M. SWANSON (CSBN 88143)
 Chief, Civil Division
 JENNIFER S WANG (CSBN 233155)
 Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
 San Francisco, California 94102-3495
 Telephone: (415) 436-6967
 Facsimile: (415) 436-6748
 Email: jennifer.s.wang@usdoj.gov

Attorneys for the Federal Defendant

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

ESTATE OF DAVID BURKHART,
 Plaintiff,
 v.
 UNITED STATES DEPARTMENT OF
 VETERANS AFFAIRS; and DOES 1 to 50
 inclusive.
 Defendants.

No. C 07-5467 PJH

**FEDERAL DEFENDANT'S NOTICE OF
 MOTION AND MOTION TO DISMISS;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION**

Date: May 28, 2008
 Time: 9:00 a.m.
 Courtroom 3, 17th Floor

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on **May 28, 2008, at 9:00 a.m.**, or as soon thereafter as counsel may be heard, before Hon. Phyllis J. Hamilton, 450 Golden Gate Avenue, San Francisco, California, Courtroom 3, 17th Floor, defendant United States Department of Veterans Affairs ("VA") will move this Court for an order dismissing the VA as a defendant in this case. This motion is based on this notice, the memorandum of points and authorities in support thereof, the pleadings on file in this action, all the matters of record filed with the Court, and such other evidence as may be submitted or considered by the Court and on such oral argument as the Court may permit.

PLEASE TAKE FURTHER NOTICE THAT, pursuant to Civil L.R. 7-3(a), any opposition to this motion must be served and filed not less than 21 days before the hearing date.

STATEMENT OF RELIEF REQUESTED

Defendant requests an order dismissing the VA from the case.

ISSUE TO BE DECIDED

1. Is the VA a proper defendant in this case?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant moves to dismiss plaintiff's complaint with leave to amend. This motion should be granted because the VA is not a proper defendant in a Federal Tort Claims Act ("FTCA") action. Prior to filing its motion to dismiss, defendant requested that plaintiff amend her complaint to substitute the United States as the proper party. Defendant first raised this issue with plaintiff in February 2008. On March 31, 2008, plaintiff informed defendant that she plans to amend her complaint to join additional parties, but did not indicate whether plaintiff would agree to substitute the United States for the VA as the defendant in this FTCA action. Plaintiff could not provide an estimate of when her amended complaint would be filed and did not respond to defendant's proposal for a stipulation to extend defendant's time to file a responsive pleading pending the filing of plaintiff's amended complaint.

The Court should grant defendant's motion to dismiss.

II. BACKGROUND

On or about October 26, 2007, Sally A. Burkhart ("plaintiff") filed a complaint as the personal representative of the Estate of David Burkhart, alleging medical malpractice, negligence, and violation of California's Elder Abuse and Dependent Adult Civil Protection Act, Cal. Welfl. & Instit. Code § 15610.57, arising from treatment received at the VA Palo Alto Health Care System by 71-year old veteran David Burkhart. *See* Compl. ¶¶ 1, 26-42.

Plaintiff alleges that in September 2002, while at the VA's hospital facility in Menlo Park, Mr. Burkhart was prescribed a medication that caused him to have an allergic reaction, resulting in cardiac arrest. *Id.* ¶ 14. Plaintiff further alleges that in September 2003, Mr. Burkhart was admitted to the VA's hospital facility in Palo Alto and subsequently transferred to the VA's Livermore facility. *Id.* ¶¶ 17-23. On or about October 26, 2003, Mr. Burkhart died in

his bed at the VA's Livermore facility. *Id.* ¶ 24. Plaintiff alleges that VA medical personnel failed to properly diagnose and treat Mr. Burkhardt. *See id.* ¶ 25.

III. ARGUMENT

A. Standard for Motion to Dismiss for Failure to State a Claim

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 527 (9th Cir. 1992) *quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On a motion to dismiss, the Court takes as true all material allegations of the complaint, *Conley*, 355 U.S. at 45-46, and these allegations are taken in the light most favorable to plaintiff. *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 558 (9th Cir. 1995).

B. The VA Should Be Dismissed from the Case

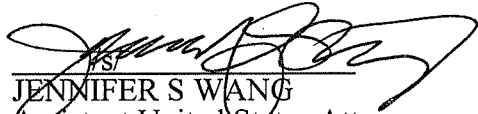
Plaintiff's tort claims are brought pursuant to the FTCA. Under the FTCA, the only proper defendant is the United States, not the VA, a government agency. To the extent plaintiff attempts to allege an FTCA claim against anyone other than the United States, her claim should fail. *See* 28 U.S.C. § 2679; *Woods v. United States*, 720 F.2d 1451, 1452 n. 1 (9th Cir. 1983). Thus, the United States should be substituted in place of the VA. 28 U.S.C. § 2679(a); *Allen v. Veterans Admin.*, 749 F.2d 1386, 1388 (9th Cir. 1984).

IV. CONCLUSION

Defendant requests that the Court grant its motion to dismiss.

Respectfully submitted,
JOSEPH P. RUSSONIELLO
United States Attorney

Dated: April 4, 2008


JENNIFER S. WANG
Assistant United States Attorney
Attorneys for the Federal Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of the following:

**FEDERAL DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

Estate of David Burkhart v. VA
Case No. CV 07-5467 PJH

to be served this date upon the party in this action by placing a true copy thereof in a sealed envelope, and served as follows:

☒ **FIRST CLASS MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

☐ **CERTIFIED MAIL (#)** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

☒ **ELECTRONIC MAIL** (*See Below*)

☐ **FEDERAL EXPRESS**

☒ **PERSONAL SERVICE (BY MESSENGER)**

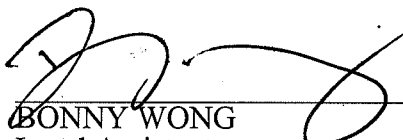
☐ **FACSIMILE (FAX)** Telephone No.: See Below

to the party(ies) addressed as follows:

Estate of David Burkhart
483 Nottingham Way
Campbell, CA 95008
(408) 371-0646
sallyburkhart@gmail.com
PRO SE

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 4, 2008 at San Francisco, California.



BONNY WONG
Legal Assistant